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17  
18 **UNITED STATES DISTRICT COURT**  
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

20 \_\_\_\_\_ )  
21 East Bay Sanctuary Covenant, *et al.*, )  
22 Plaintiffs, ) DEFENDANTS' REPLY IN SUPPORT  
23 ) OF MOTION TO STRIKE  
24 v. ) EXTRA-RECORD EVIDENCE  
25 Donald J. Trump, President of the United ) Civil Action No. 3:18-cv-06810-JST  
26 States, *et al.*, )  
27 Defendants. )  
28 \_\_\_\_\_ )

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## **INTRODUCTION**

The Court should strike all extra-record evidence submitted by Plaintiffs in support of their merits arguments or cited for any purpose other than demonstrating organizational standing or cognizable irreparable harm. The Court should also strike the additional extra-record evidence Plaintiffs cite in their reply in support of their motion for preliminary injunction, filed after Defendants had any opportunity to respond to it in merits briefing.<sup>1</sup>

Plaintiffs concede that this is an APA case and thus the record rule applies, and they do not challenge—and therefore concede—that the record certified by the government is the full and complete record. Only now that their attempt to circumvent the record rule has been called out do Plaintiffs even attempt—unsuccessfully—to justify their reliance on extra-record evidence in a record review case. But even those untimely arguments lack merit.

First, Plaintiffs identify no basis for this Court to consider extra-record evidence for any purpose other than consideration of Plaintiffs' organizational standing and the alleged irreparable harm they suffer. Second, Plaintiffs' assertion that the Defendants' invocation of the foreign-affairs or good-cause exceptions to notice-and-comment rulemaking was improper is subject to the record rule, and Plaintiffs offer no basis to depart from that rule. Finally, even assuming Plaintiffs have met their heavy burden of justifying departure from the record rule as to any of their evidence, that evidence is not competent evidence for any of the purposes it is submitted for, and the Court should disregard it.

## **ARGUMENT**

At the threshold, Plaintiffs have not formally moved to submit extra-record evidence. They have thus waived their ability to do so and should not be allowed to do so after Defendants have filed their merits brief. *See, e.g., Wiechers v. Moore*, No. 1:13-CV-00223, 2014 WL 1400843, at \*18 (E.D. Cal. Apr. 10, 2014) (declining to consider extra-record evidence because “Plaintiff failed to timely petition for its consideration”). Even assuming Plaintiffs may simply

<sup>1</sup> Because Plaintiffs have submitted yet more extra-record evidence, which Defendants address below, Defendants are submitting a revised proposed order. All extra-record submissions listed in that order should be struck for failure to demonstrate any basis to depart from the record rule. Additionally, the list of documents and citations to be struck are incorporated by reference here.

1 submit extra-record evidence without following the proper procedure, nothing in Plaintiffs'  
 2 opposition brief establishes any basis to depart from the record rule.

3 **I. Plaintiffs May Only Cite Extra-Record Evidence Relating to Standing and  
 4 Irreparable Harm.**

5 Plaintiffs identify no basis for this Court to consider extra-record evidence for any purpose  
 6 other than consideration of Plaintiffs' organizational standing and the alleged irreparable harm  
 7 they suffer. Plaintiffs assert that courts "routinely consider extra-record evidence concerning  
 8 whether injunctive relief should be granted," but their citations to authority are misleading at best  
 9 and distinguishable. Opp. 3.

10 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), included claims under the  
 11 Endangered Species Act, claims under which are not limited to record review. *See W. Watersheds*  
 12 *Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011). Additionally, the extra-record  
 13 evidence issue was intensely litigated before the district and circuit courts, but it was not addressed  
 14 in briefing before the Supreme Court or discussed by the Court at all.<sup>2</sup> *Jiahao Kuang v. U.S.*  
 15 *Dep't of Defense*, 2018 WL 6025611 (N.D. Cal. Nov. 16, 2018) (Tigar, J.) is similarly inapt.  
 16 There, the parties did not brief the issue, but the Court nevertheless determined that, while it would  
 17 not strike the extra-record declaration at that time, it would "not consider its assertions as support  
 18 for the merits of DoD's policy." *Id.* at \*30. Additionally, the question the Court said it could  
 19 consider was whether an injunction would "harm the public interest," it did not decide that the  
 20 extra-record declaration could be considered for any and all non-merits purposes. *Id.* (emphasis  
 21 added). In *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064 (N.D. Cal. 2003), the defendants did  
 22 not dispute that extra-record documents could be considered for equitable or public interest  
 23 considerations. *Id.* at 1078 n.16. Notably, the administrative record had not even been produced  
 24 yet in that case. *Id.* Moreover, the statute at issue there specifically directed the secretary to  
 25 engage a scientific study before the regulation could be relaxed, and accordingly the scope of data

26  
 27 <sup>2</sup> See Brief for the Petitioners, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) No. 07-  
 28 1239, 2008 WL 3285392; Brief of Respondent California Coastal Comm'n, *Winter v. Nat. Res.*  
*Def. Council, Inc.*, 555 U.S. 7 (2008) No. 07-1239, 2008 WL 4181884; Brief for the Respondents,  
*Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) No. 07-1239, 2008 WL 4154536.

1 considered was statutorily at issue in a way not present here. *See id.* at 1069-70. *Hill*  
 2 *Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 2012 WL 5914516 (D.D.C. May 18, 2012), is  
 3 an unpublished decision where the court determined that it did not need to reach the non-merits  
 4 portions of the preliminary injunction analysis and thus ultimately deemed the extra-record  
 5 evidence “irrelevant and inadmissible for any purpose.” *Id.* at \*10. While the D.C. Circuit  
 6 affirmed the decision, it did not reach the issue of the consideration of extra-record evidence. *Hill*  
 7 *Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 709 F.3d 44 (D.C. Cir. 2013). Finally, in *Eco*  
 8 *Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360 (D.D.C. 2017), both parties submitted  
 9 declarations relating to the balance of harms and public interest and apparently consented to their  
 10 consideration. *Id.* at 369 n.7.

11 Plaintiffs also claim that they can submit evidence to preserve their third-party standing  
 12 argument for appeal while at the same time claiming that the Ninth Circuit’s decision is  
 13 controlling on merits issues. *Compare* Opp. 2 with ECF No. 92. Plaintiffs cannot have it both  
 14 ways. Plaintiffs also wrongly assert that they may submit evidence relating to their “prudential  
 15 standing” arguments. Opp. 2. They cite no authority for this claim. Indeed, the zone-of-interests  
 16 inquiry is not jurisdictional, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,  
 17 126, 128 n.4 (2014); it therefore is not exempt from the record rule.

18 Plaintiffs thus do not cite a single case actually holding that their evidence may be  
 19 considered other than for demonstrating organizational standing or irreparable harm tied to  
 20 cognizable claims of injury, and for good reason: their assertions are explicitly contrary to the  
 21 APA. *See* 5 U.S.C. § 706. They have therefore failed to establish that the Court should depart  
 22 from the record rule to consider the extra-record evidence they belatedly cite relating to the  
 23 balance of the equities and whether an injunction is in the public interest.

24 **II. The Government’s Invocation of the Foreign-Affairs and Good-Cause Exceptions**  
 25 **Provide no Basis to Depart from the Record Rule**

26 Plaintiffs, without citing any authority, assert that the record review rule does not apply to  
 27 review of Defendants’ invocation of the foreign-affairs or good-cause exceptions to notice-and-  
 28 comment rulemaking. Opp. 5-8. But, the record rule is the default under the APA, 5 U.S.C.

1   § 706, and Plaintiffs point to no statute or case law justifying a deviation from that well-  
 2   established norm. Plaintiffs must carry the “heavy burden to show that the additional materials  
 3   sought are necessary.”<sup>3</sup> *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th  
 4   Cir. 2010). They have not done so.

5       The APA provides no exception to the record rule for review of the invocation of the  
 6   foreign-affairs or good-cause exceptions to the notice-and-comment and delayed-implementation  
 7   requirements. As Defendants explained in their motion, Mot. 7, both are “findings[] and  
 8   conclusions” that Plaintiffs ask the Court to “set aside.” 5 U.S.C. § 706. If Plaintiffs are  
 9   challenging the failure of the rule to undergo notice-and-comment, then they are claiming that the  
 10   rule was issued “without observance of procedure required by law.” *Id.* § 706(2)(D). The APA  
 11   itself makes clear that judicial review of such a claim should be limited to the administrative  
 12   record: “In making the foregoing determinations, the court shall review the whole record or those  
 13   parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” *Id.*  
 14   § 706. Plaintiffs do not address this argument, and therefore have conceded it. *See Ardente, Inc.*  
 15   *v. Shanley*, No. C 07-4479 MHP, 2010 WL 546485, at \*6 (N.D. Cal. Feb. 9, 2010) (“Plaintiff fails  
 16   to respond to this argument and therefore concedes it through silence.”), *cited in Tagoia v. Wells*  
 17   *Fargo Bank, N.A.*, No. 17-CV-06777, 2018 WL 3377967, at \*5 (N.D. Cal. July 11, 2018).

18           **A. Foreign-Affairs Exception**

19       Rather than address the statute as written, Plaintiffs mischaracterize case law in an effort  
 20   to erect a novel exception to the record rule for cases involving the foreign-affairs exception. Opp.  
 21   5-6. Plaintiffs first assert that courts, including the Ninth Circuit, “have relied on extra-record  
 22  
 23

24       <sup>3</sup> Plaintiffs bear the burden of demonstrating the agency’s action is arbitrary and capricious. *See*  
 25   *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009); *City of Olmsted Falls,*  
 26   *Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) (“[T]he party challenging an agency’s action as  
 27   arbitrary and capricious bears the burden of proof . . . . Indeed, even assuming the [agency] made  
 28   missteps . . . the burden is on petitioners to demonstrate that the [agency’s] ultimate conclusions  
 29   are unreasonable.”) (internal punctuation and citations omitted). A Court must be “highly  
 30   deferential” in an APA review case, and must “presum[e] the agency action to be valid . . . .” *Nw.*  
*Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007).

1 evidence to assess whether a government agency properly invoked the foreign affairs exception,”  
 2 suggesting that evidence may be submitted by either party at any time. Opp. 5. That is wrong.

3 In *Yassini v. Crosland*, the court allowed the *government* to submit extra-record evidence  
 4 in the form of declarations from government officials, *before* the administrative record, if any,  
 5 was ever served. 618 F.2d 1356, 1361 (9th Cir. 1980). Indeed, citing *Yassini*, the Ninth Circuit  
 6 in this case, recognizing that no record had yet been submitted, stated that the *government* was  
 7 free to submit a “record on this issue in the district court.” *East Bay Sanctuary Covenant v.*  
 8 *Trump*, No. 18-17274, slip op. 57 (9th Cir. Dec. 7, 2018) (citing *Yassini*, 618 F.2d at 1361 (noting  
 9 affidavits in support of the foreign affairs exception from the Attorney General and Deputy  
 10 Secretary of State)). The Ninth Circuit did *not* invite Plaintiffs to submit extra-record evidence  
 11 to challenge the government’s reasoning.

12 Plaintiffs’ reliance on *Doe v. Trump*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017), is also  
 13 misplaced and their characterization of it misleading. The court did not rely on or even “cite” to  
 14 the extra-record declaration from former officials the plaintiffs submitted in *Doe*; rather, the court  
 15 acknowledged that the government had not submitted any evidence on the issue and noted in a  
 16 footnote that the declaration was the only evidence on the issue in the record. *Id.* at 1076 n.21.  
 17 Furthermore, the decision contains no discussion as to whether the court could consider the  
 18 document under the record rule.

19 Plaintiffs also assert that the government bears the burden of showing why Plaintiffs may  
 20 not circumvent the extra-record rule. Opp. 6. That has the record rule completely backwards. It  
 21 is *Plaintiffs* who must establish an exception to the record rule in an APA case. *San Luis & Delta-*  
*22 Mendota Water Auth. v. Locke*, 776 F.3d 971, 992-93 (9th Cir. 2014) (“the party seeking to admit  
 23 extra-record evidence initially bears the burden of demonstrating that a relevant exception  
 24 applies”). Again, they cite no authority to support their attempt to turn this burden on its head.  
 25 When a court reviews an agency determination, “there are no disputed facts that the district court  
 26 must resolve.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). “[T]he function  
 27 of the district court is to determine whether or not as a matter of law the evidence in the  
 28 administrative record permitted the agency to make the decision it did.” *Id.* There is no reason

1 that the review of procedural claims, such as the government’s invocation of the foreign-affairs  
 2 exception, would depart from this. Indeed, regardless of the standard of review courts apply when  
 3 reviewing procedural APA claims, they do not go beyond the administrative record. *See Sorenson*  
 4 *Commc’ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014) (relying on the administrative record  
 5 when reviewing the agency’s invocation of the good-cause exception); *United States v. Johnson*,  
 6 632 F.3d 912, 928 (5th Cir. 2011) (relying on the good-cause reasoning provided in the rule);  
 7 *United States v. Valverde*, 628 F.3d 1159, 1166-68 (9th Cir. 2010) (same); *United States v. Dean*,  
 8 604 F.3d 1275, 1279-81 (11th Cir. 2010) (same); *United States v. Cain*, 583 F.3d 408, 421 (6th  
 9 Cir. 2009) (same); *United States v. Gould*, 568 F.3d 459, 469 (4th Cir. 2009) (same); *Hawaii*  
 10 *Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (same); *Am. Transfer &*  
 11 *Storage Co. v. Interstate Commerce Comm’n*, 719 F.2d 1283, 1293 (5th Cir. 1983) (same).<sup>4</sup>

12 And that is especially appropriate with the foreign-affairs exception. Mot. 8-9. Under  
 13 Plaintiffs’ argument any challenger to government action involving foreign affairs could submit  
 14 a declaration second-guessing the government’s determinations on sensitive foreign-affairs  
 15 matters, thereby creating their own record, while the Executive’s conclusion that notice and  
 16 comment is not required because “there is involved . . . a military or foreign affairs function of  
 17 the United States,” 5 U.S.C. § 553(a), would be bound to the record it produced. Such a result  
 18 finds no support in the text of the APA or any case Plaintiffs cite, and so must be rejected.

19 As Plaintiffs have not shown that the foreign-affairs exception is exempt from the record-  
 20 review rule and alleged no exception to the rule that covers their extra-record evidence, the Court  
 21 must strike their extra-record evidence to the extent it addresses and is cited in relation to the  
 22 foreign-affairs exception.

23 **B. Good-Cause Exception**

24 Plaintiffs concede that the record-review rule applies to the government’s invocation of  
 25 the good-cause exception, but claim that the Court may consider their evidence because it

26 <sup>4</sup> Plaintiffs ultimately argue that “Defendants’ invocation of the foreign affairs exception fails  
 27 even if the Court ignores the additional evidence and looks only to the Rule and/or administrative  
 28 record.” Opp. 6. They thus admit that their extra-record evidence is not “necessary” for the Court  
*Fence Creek Cattle Co.*, 602 F.3d at 1131.

1 identifies “relevant factors the agency did not consider.” Opp. 6-7; *see Jiahao Kuang*, 2018 WL  
 2 6025611 at \*8 (discussing this exception to the record rule). Other than that conclusory statement,  
 3 however, Plaintiffs do not identify what relevant factors they believe the agencies failed to  
 4 consider that would thus allow the Court to consider their extra-record evidence. They have  
 5 therefore failed to meet their heavy burden of establishing that an exception applies. *Fence Creek*  
 6 *Cattle Co.*, 602 F.3d at 1131; *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir.  
 7 2005) (“These limited exceptions operate to identify and plug holes in the administrative  
 8 record.”).

9 None of the cases Plaintiffs cite support them. The Ninth Circuit in *Earth Island Inst.*  
 10 merely stated that the district court properly admitted the extra-record evidence under the  
 11 “relevant factors” exception. 442 F.3d at 1162. The ability of the Court to do so is not in dispute.  
 12 And there is no support for Plaintiffs’ claim that the Supreme Court in *Winter* discussed an extra-  
 13 record declaration “pursuant to ‘relevant factors’ exception.” Contrary to Plaintiffs’ suggestion,  
 14 those words do not appear anywhere in the Court’s decision, and that issue was not litigated before  
 15 or addressed by the Court. Indeed, the briefing before the Court makes no mention of the extra-  
 16 record evidence issue. *See supra* n.2.

17 Plaintiffs fault Defendants for not citing authority foreclosing consideration of extra-  
 18 record evidence in good-cause cases and suggest that, because they believe the agencies’  
 19 invocation of the good-cause exception is not entitled to deference, review of that invocation is  
 20 exempt from the record rule. *See Opp. 7-8.* But as with their foreign-affairs argument, Plaintiffs  
 21 again have it backwards by suggesting anyone but them bear the burden of demonstrating that  
 22 departing from the record rule is warranted. *Fence Creek Cattle Co.*, 602 F.3d at 1131.  
 23 Additionally, they fail to cite any case in support of their claim that good-cause cases are exempt  
 24 from the record rule. *See Opp. 7-8.* Their invocation of an exception to that rule belies the fact  
 25 that they understand the record rule to apply.

26 Plaintiffs assert that the question here is a legal, not factual, one by arguing that the  
 27 agencies’ legal conclusions are subject to de novo review. Opp. 7. But Plaintiffs confuse legal  
 28 standards of review with whether the court may create a new record when applying those

1 standards. Regardless whether *de novo* or arbitrary-and-capricious review applies to the  
 2 government's invocation of good cause, *see Valverde*, 628 F.3d at 1162 (declining to determine  
 3 whether review an invocation of the good-cause exception under a de novo or arbitrary-and-  
 4 capricious standard), it is well-settled that in an APA case, "the focal point for judicial review  
 5 should be the administrative record already in existence, not some new record made initially in  
 6 the reviewing court," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), and that the court does not "resolve  
 7 any facts in a review of an administrative proceeding," *Occidental Eng'g Co.*, 753 F.3d at 769.  
 8 Based on this well-established APA principle, therefore, Plaintiffs cannot justify a departure from  
 9 the record rule under the relevant factors exception.<sup>5</sup>

### 10 **III. Plaintiffs' Extra-Record Evidence Is Otherwise Inappropriate.**

11 Even assuming Plaintiffs have satisfied their heavy burden for submission of extra-record  
 12 evidence in an APA record-review case, their submissions are inappropriate on their own merits.

13 Plaintiffs seek admission of four types of documents: (1) twenty-seven declarations,  
 14 including supplemental declarations and corrected declarations, many of which cite news articles,  
 15 NGO reports, and other non-record documents; (2) two news articles; (3) a comment to a rule  
 16 from an attorney organization; and (4) a USCIS document regarding credible fear caseloads from  
 17 USCIS's website. The declarations can be further broken down into two categories: (1)  
 18 declarations from third-party experts, researchers, advocates, or former officials challenging the  
 19 soundness of the agencies' decision or providing information about conditions in Mexico or  
 20 Central American countries; and (2) declarations from employees of the Plaintiff organizations.  
 21 None of these documents are relevant to Plaintiffs' claims—(1) that the rule conflicts with the  
 22 asylum statute, and (2) that the rule violates the APA's notice and comment and delayed  
 23 effectiveness requirements, *see Compl. ¶¶ 101-06, 108-10*—and instead improperly second-guess

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24 <sup>5</sup> Plaintiffs again seem to overlook that their own reasoning does not justify a departure from the  
 25 APA's record rule. They argue that they "are likely to succeed on this claim even if the Court  
 26 limits its review to the administrative record." Opp. 8. They therefore concede that they have not  
 27 met their "heavy burden to show that the additional materials sought are *necessary*" for the Court  
 28 to adequately review the agencies' decision. *Fence Creek Cattle Co.*, 602 F.3d at 1131 (emphasis  
 added).

1 the agencies' decision. Additionally, much of the extra-record evidence should be struck because  
 2 it is inadmissible under the Federal Rules of Evidence.<sup>6</sup>

3       **A. Declarations from Professors, Researchers, Advocates, and Former  
 4           Government Officials**

5       Plaintiffs' attempt to introduce their many self-serving declarations regarding the wisdom  
 6       of the rule is off-base. "Even where the Court allows such supplementary evidence,  
 7       '[c]onsideration of the evidence to determine the correctness or wisdom of the agency's decision  
 8       is not permitted, even if the court has also examined the administrative record.'" *Jiahao Kuang*,  
 9       2018 WL 6025611 at \*27 (quoting *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160  
 10      (9th Cir. 1980)). Plaintiffs' submission of and citations to these documents fly in the face of this  
 11      prohibition.

12       First, the declarations submitted in an effort to undermine the agencies' keeping of and  
 13      reliance on their statistics do not fit the exception invoked and improperly challenge the "wisdom  
 14      of the agenc[ies'] decision."<sup>7</sup> *See id.* These declarations do not meet an exception and are purely  
 15      submitted in an attempt to second-guess the wisdom of the agencies' decision. Additionally, these  
 16      attempts at back-dooring in inadmissible hearsay—the news stories—should be deflected. Fed.

17      <sup>6</sup> Each of the following items contains inadmissible statements: ECF No. 8-2; ECF No. 8-3; ECF  
 18      No. 8-4; ECF No. 8-5; ECF No. 8-6; ECF No. 35-1; ECF No. 35-2; ECF No. 35-3; ECF No. 35-  
 19      4; ECF No. 35-5; ECF No. 35-6; ECF No. 35-7; ECF No. 35-8; ECF No. 35-9; ECF No. 35-10;  
 20      ECF No. 71-1; ECF No. 71-2; ECF No. 71-4; ECF No. 71-5; ECF No. 71-6; ECF No. 71-7; ECF  
 21      No. 71-8; ECF No. 71-9; Nick Miroff & Missy Ryan, "Army assessment of migrant caravans  
 22      undermines Trump's rhetoric," Washington Post (Nov. 2, 2018); Vanessa Romo, "LGBT Splinter  
 23      Group from Migrant Caravan is the 1st to Arrive in Tijuana," NPR (Nov. 13, 2018); Comment of  
 24      American Immigration lawyers Association on proposed immigration appeal regulation (Aug. 18,  
 25      2008); USCIS, Credible Fear Workload Summary, from USCIS.gov.

26      <sup>7</sup> For example, the Isaacson Declaration at ECF No. 8-2 provides various statistics regarding border  
 27      crossings over the years and proffers the author's opinion that the caravan will take a long time  
 28      to arrive and that only about 15 to 20 percent of the members of the caravan will arrive at the  
 29      U.S.-Mexico border. ECF No. 8-2 at ¶¶ 9-10. The Cutlip-Mason Declaration at ECF No. 35-2  
 30      describes the author's opinions, based on her time working with EOIR, as to the faults in EOIR's  
 31      data keeping regarding in absentia removals. And in the Rodriguez Declaration at ECF No. 35-  
 32      9, the author states that "it has always been [his] understanding that USCIS expends the same  
 33      level of resources to process asylum seekers who enter the United States at ports of entry and  
 34      asylum seekers who enter between ports of entry." *Id.* at ¶ 7.

1 R. Evid. 802. Moreover, these statements attempt to usher in factual allegations about which the  
 2 declarants have not established personal knowledge, also requiring their inadmissibility. Fed. R.  
 3 Evid. 602.

4 Second, Plaintiffs' declarations also attempt to undermine the agencies' explanation for  
 5 the need to have an orderly application process and to discourage asylum seekers from making  
 6 the dangerous trek across the border.<sup>8</sup> Not only do these declarations improperly second-guess  
 7 the agencies' determinations, they go to issues the Ninth Circuit has found not at issue in this case  
 8 and thus are irrelevant. Op. at 28 ("And although the Organizations describe significant  
 9 hindrances their clients have experienced in applying for asylum at ports of entry, as well as  
 10 significant risks their clients may face in towns lining the country's southern border, neither of  
 11 those concerns is at issue in this lawsuit.")

12 Third, the declarations describing researchers', advocates', and professors' beliefs and  
 13 prognostications as to the behavior of caravans, the knowledge of asylum seekers, and the persons  
 14 that make up past and current caravans also seek to challenge the correctness of the agencies'  
 15 decisions. For example, several declarations state that members of prior caravans entered at ports  
 16 of entry<sup>9</sup> and that many asylum seekers are unaware that they may present themselves at ports of  
 17 entry, do not understand the concept of a port of entry, or are forced to cross between ports by  
 18 criminal elements.<sup>10</sup> Some provide information about the members and aims of this and past  
 19 caravans.<sup>11</sup> At least one discusses the violence facing members of the caravan in their home

20  
 21  
 22 <sup>8</sup> See ECF No. 35-4 at ¶¶ 5-10 (discussing the backlog for asylum applicants at the border); ECF  
 23 No. 35-5 at ¶ 5 (discussing wait times and dangers in Mexico for LGBTQ individuals); ECF No.  
 24 71-6 (describing the author's concerns about the health and well-being of those waiting to enter  
 the United States); ECF No. 71-7 (describing the author's observations of the "metering" of  
 asylum applicants at the border and the conditions they live in while waiting to enter).

25 <sup>9</sup> ECF No. 8-2 at ¶ 10; ECF No. 35-5 at ¶ 9; ECF No. 35-8 at ¶ 23; ECF No. 71-2 at ¶ 23.

26 <sup>10</sup> ECF No. 8-4 at ¶ 26; ECF No. 8-6 at ¶ 14; ECF No. 35-4 at ¶ 12; ECF No. 35-6 at ¶ 4; ECF  
 27 No. 71-5 at ¶ 19.

28 <sup>11</sup> ECF No. 35-7; ECF No. 71-9.

1 countries.<sup>12</sup> Plaintiffs have not established how this is relevant to their claims or how these  
 2 declarations and citations thereto meet an exception to the record rule. Also, these statements are  
 3 not only inadmissible hearsay upon hearsay without exception, they appear to lack competence  
 4 because the declarants do not have personal knowledge of the factual statements made. *See Fed.*  
 5 *R. Evid.* 602, 802, & 805.

6 Fourth, Plaintiffs' attempt to submit a declaration proclaiming the rule inconsistent with  
 7 the United States' international obligations is off-base.<sup>13</sup> U.S. Federal Courts determine whether  
 8 our laws comply with our international obligations, *see INS v. Cardoza-Fonseca*, 480 U.S. 421,  
 9 429 (1987), not scholars or other non-U.S. entities. And in addition to being improper expert  
 10 testimony, these statements are classic legal conclusions, and are therefore inadmissible. *United*  
 11 *States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999).

12 Fifth, and finally, Plaintiffs, through their extra-record declarations, improperly attempt to  
 13 challenge the propriety and wisdom of a safe-third country agreement with Mexico.<sup>14</sup> The  
 14 opinions of the declarants as to the propriety of a safe-third country agreement with Mexico are  
 15 entirely improper. Plaintiffs are not challenging the Administration's seeking of such an

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17 <sup>12</sup> ECF No. 71-7.

18 <sup>13</sup> ECF No. 8-5 ("In my opinion, this new policy is inconsistent with and violates the international  
 19 obligations of the United States."); *see also* ECF No. 71-9 (discussing the "harmful effects of  
 attempt to implement hard-line border controls that aim to deter migration").

20 <sup>14</sup> For example, in the Supp. Isacson Declaration, the author writes that he believes Mexico cannot  
 21 be a safe third country. ECF No. 35-4 at ¶ 11. Similarly, the Chavla Declaration at ECF No. 35-  
 22 1 discusses the situation facing asylum-seekers in Mexico and is attached to a report entitled "Why  
 23 Mexico Does Not Qualify as a Safe Third Country." The Griffey Declaration at ECF No. 35-3  
 24 discusses the author's impressions as to the dangerous situation in Mexico and includes a report  
 25 he wrote about those dangers. *See also* ECF No. 71-5 (discussing the conditions in Mexico). The  
 26 Former Officials' Declaration at ECF No. 71-4 similarly questions the wisdom of the rule's stated  
 27 goals and the actions the Administration has taken to achieve those goals. *Id.* at ¶ 5 ("Contrary to  
 28 the Administration's claims, there is no migration emergency at the southern border."); *id.* at ¶ 6  
 (providing examples of what the government could do to "manage the challenge of large volumes  
 of asylum applications"); *id.* at ¶ 7 (discussing with approval policies enacted by the last  
 Administration); *id.* at ¶ 9 ("In sum, the Administration has launched a series of counter-  
 productive policy measures that create new humanitarian problems, then mischaracterizes the  
 predictably calamitous outcome of these failed measures as an "emergency" that justifies further  
 punitive actions against asylees themselves.").

1 agreement. To the extent they are attempting to submit such evidence to indirectly challenge the  
 2 wisdom of the rule or the invocation of the foreign-affairs exception, their evidence does not meet  
 3 one of the exceptions. Moreover, the opinions provided by former government officials,  
 4 researchers, and scholars acting as armchair quarterbacks is wholly inappropriate. The issue here  
 5 is not whether former government officials agree with the policy but whether it is arbitrary and  
 6 capricious. *See* ECF No. 71-4 at ¶ 10 (“In our professional judgment, the failure to move forward  
 7 immediately with an emergency rule will not damage our relations with Mexico or Northern  
 8 Triangle countries.”). None of these former officials, scholars, or researchers are parties to the  
 9 negotiations currently underway, and their speculation as to the potential impact of the rule is not  
 10 properly before this Court because it is not based on personal knowledge. Fed. R. Evid. 602, and  
 11 if they are to be considered expert witnesses, these statements are also inadmissible legal opinions,  
 12 *Scholl*, 166 F.3d at 973.

13 A common theme runs throughout these declarations—the authors believe the rule is  
 14 unwise or will not achieve its stated goals. However, Plaintiffs and their declarants are not the  
 15 decision makers. And their disagreement with the government’s policy—even their disagreement  
 16 as to the effect the policy will have—does not exempt their evidence from the record rule.

17 **B. Declarations from Plaintiffs’ Employees**

18 As stated in Defendants’ motion to strike, Defendants do not object to the inclusion and  
 19 citation to the declarations submitted by employees of the Plaintiff organizations to the extent  
 20 they support Plaintiffs’ organizational standing and irreparable harm arguments. Mot. 5.  
 21 However, the declarations authored by Plaintiffs’ employees cannot be admitted to the extent they  
 22 are cited in support of third-party standing arguments, to allege irreparable harm to third parties,  
 23 and to support zone-of-interest arguments. *See* Op. 27-28 (Plaintiffs do not have third-party  
 24 standing); *Lexmark Int’l, Inc.*, 572 U.S. at 126, 128 n.4 (zone-of-interests inquiry is not  
 25 jurisdictional). It is one of the most foundational rules of evidence in the federal system: only  
 26 relevant evidence is admissible. Fed. R. Evid. 401, 402. Accordingly, to the extent these  
 27  
 28

1 declarations are admitted, all of the statements in these declarations that do not have any tendency  
 2 to make a fact at issue more or less true should be struck.<sup>15</sup> *Id.*

3 Moreover, because whether a plaintiff is within the zone of interests is not a jurisdictional  
 4 question, *Lexmark*, 572 U.S. 118, citations to extra-record evidence for this purpose are not  
 5 exempt from the record rule.<sup>16</sup> *See Nw. Envtl. Advocates v. U.S. Dep’t of Commerce*, 322 F. Supp.  
 6 3d 1093, 1099 n.3 (W.D. Wash. 2018) (“The Court takes judicial notice of extra-record evidence  
 7 Plaintiff presents from agency websites to the extent it goes to the issue of *jurisdiction*.”)  
 8 (emphasis added).

9 In sum, the citations to and information in these extra-record documents relating to any  
 10 argument other than Plaintiffs’ assertions of organizational standing and irreparable harm to those  
 11 organizations are improper under the record rule and do not meet one of its narrow exceptions. It  
 12 follows that these statements are not relevant because that have no bearing on Plaintiffs’ claims—  
 13 their alleged organizational harm. Fed. R. Evid. 401, 402. Accordingly, they are also  
 14 inadmissible and should be struck.

15 **C. News Articles and Internet Documents**

16 The Court should also strike two news articles, an online document from the American  
 17 Immigration Lawyers Association, and a USCIS document Plaintiffs cite in support of merits  
 18 arguments.<sup>17</sup> The citations to these articles are clearly an attempt to second-guess the correctness

19 <sup>15</sup> Specifically, citations to the following declarations should be struck to the extent they refer to  
 20 third-party standing arguments or to support arguments about harms to third parties: ECF No. 8-  
 21 4; ECF No. 35-8; ECF No. 71-2; ECF No. 71-4; ECF No. 71-5; ECF No. 71-6; ECF No. 71-8;  
 22 ECF No. 71-1; ECF No. 71-9). Similarly, citations to and statements regarding the alleged  
 23 irreparable harms relating to organization employees’ accompanying children in Mexico should  
 24 also be struck because, as the Ninth Circuit found, the concerns relating to those actions are not  
 25 relevant to this suit: ECF No. 71-2 on pages 9-10 of ECF No. 71; and ECF No. 71-8 on pages 9-  
 26 10 of ECF No. 71. Op. 28.

27 <sup>16</sup> The following declarations are cited in support of Plaintiffs’ zone-of-interests arguments, and  
 28 those citations should be struck, as set forth in Defendants’ proposed order: ECF No. 8-3; ECF  
 29 No. 8-4; ECF No. 8-6; ECF No. 8-7; ECF No. 35-6; ECF No. 35-10.

30 <sup>17</sup> Plaintiffs cite a Washington Post article from November 2, 2018 in their TRO motion and reply  
 31 and in the reply in support of their preliminary injunction motion for information about military  
 32 estimates of how many members of the caravan would reach the United States. Nick Miroff &  
 33

1 or wisdom of the agency’s decision, which is not permitted in an APA case. *See Jiahao Kuang*,  
 2 2018 WL 6025611 at \*27.<sup>18</sup>

3 In addition to these news articles, all the news articles cited in the declarations should be  
 4 struck. The declaration statements citing the news articles constitute layers and layers of hearsay,  
 5 each being inadmissible. Indeed, if any one link in the hearsay-within-hearsay chain is  
 6 inadmissible, all of it is inadmissible. Fed. R. Evid. 805; *United States v. Pena-Gutierrez*, 222  
 7 F.3d 1080, 1087-88 (9th Cir. 2000). Here, the statements in the declarations are each offered for  
 8 their truth, as well as the statements made by the writers in the news articles, and the individuals  
 9 quoted by the writers. That is at least four layers of hearsay offered for truth in the declarations,  
 10 and three in each article, and because there is no exception, they are inadmissible. *See United*  
 11 *States v. Mays*, 246 F.3d 677, 2000 WL 1860727, at \*1 (9th Cir. 2000) (not reported).

12 Plaintiffs cite two other extra-record documents that should be struck—a comment by the  
 13 American Immigration Lawyers Association cited at ECF No. 35 at 4 n.3, and charts produced by  
 14 U.S. Citizenship and Immigration Services cited at ECF No. 71 at 19 n.4. Neither are included in  
 15 the administrative record, and Plaintiffs have provided no reason to justify their inclusion.  
 16 Accordingly, on top of being inadmissible hearsay offered for truth, they are also inadmissible  
 17 because they lack relevance to the material issues raised by Plaintiffs’ organizational claims. Fed.  
 18 R. Evid. 401, 402, 801, 802.

19 **CONCLUSION**

20 Plaintiffs have not met their “heavy burden” of establishing an exception to the record  
 21 rule. Accordingly, the Court should strike the extra-record evidence to the extent it is not

22 Missy Ryan, “Army assessment of migrant caravans undermines Trump’s rhetoric,” Washington  
 23 Post (Nov. 2, 2018), *cited at* ECF No. 8-1 at 10 n.5; ECF No. 35 at 9; ECF No. 92 at 9 n.11. And  
 24 they cite to an NPR article for the proposition that “many of the caravan’s members were already  
 25 expected to seek asylum at a port of entry, contrary to the rule’s unsupported claim that they will  
 26 seek to enter unlawfully.” ECF No. 35 at 9 n.8 (citing Vanessa Romo, “LGBT Splinter Group  
 27 from Migrant Caravan is the 1st to Arrive in Tijuana,” NPR (Nov. 13, 2018)).

28 <sup>18</sup> Additionally, the NPR article post-dates the rule and thus “may not be advanced as a new  
 rationalization either for sustaining or attacking an agency’s decision.” *Ctr. for Biological  
 Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir.2006) (internal citations and  
 quotations omitted).

1 submitted in support of Plaintiffs' organizational standing and related irreparable harm claims.  
2 And even if Plaintiffs have met their heavy burden, their evidence is not competent evidence and  
3 the Court should disregard it.

4 Respectfully submitted,

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28

## **CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the Northern District of California by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

East Bay Sanctuary Covenant, *et al.*, )  
Plaintiffs, ) [PROPOSED] ORDER GRANTING  
v. ) MOTION TO STRIKE  
Donald J. Trump, President of the United ) Civil Action No. 3:18-cv-06810-JST  
States, *et al.*, )  
Defendants. )

1 The Court GRANTS Defendants' Motion to Strike and hereby strikes the following:

2 (1) Isacson Declaration (ECF No. 8-2), Goodwin-Gill Declaration (ECF No. 8-5), Chavla  
3 Declaration (ECF No. 35-1), Cutlip-Mason Declaration (ECF No. 35-2), Griffey  
4 Declaration (ECF No. 35-3), Supp. Isacson Declaration (ECF No. 35-4), Love Declaration  
5 (ECF No. 35-5), Supp. Manning Declaration (ECF No. 35-6), Penman Declaration (ECF  
6 No. 35-7), Rodriguez Declaration (ECF No. 35-9), Seyler Declaration (ECF No. 35-10),  
7 Former Officials' Joint Declaration (ECF No. 71-4), Slack Declaration (ECF No. 71-5),  
8 Mitchell-Bennet Declaration (ECF No. 71-6), Brané Declaration (ECF No. 71-7), Supp.  
9 Penman Declaration (ECF No. 71-9), and Corrected Ramos Declaration (ECF 84-1) and  
10 citations thereto in Plaintiffs' Motion for Temporary Restraining Order (ECF No. 8-1),  
11 Reply in Support of Temporary Restraining Order (ECF No. 35), and Motion for  
12 Preliminary Injunction (ECF No. 71) and all citations therein and thereto;

13 (2) citations to Sharp Declaration (ECF No. 8-3) at page 14 of ECF No. 71; Pinheiro  
14 Declaration (ECF No. 8-4) on pages 8 and 15 of ECF No. 8-1, pages 10 and 14 (second  
15 citation) of ECF No. 35, pages 12 and 14 of ECF No. 71, and page 10 nn.12-13 of ECF  
16 No. 92; Manning Declaration (ECF No. 8-6) at page 8 of ECF No. 8-1, page 14 of ECF  
17 No. 71, and page 10 n.12 of ECF No. 92; Smith Declaration (ECF No. 8-7) at page 14 of  
18 ECF No. 71; Supp. Pinheiro Declaration (ECF No. 35-8) at pages 7-8 and 14 of ECF No.  
19 35 and page 10 nn.12-13 of ECF No. 92; Corrected Supp. Pinheiro Declaration (ECF No.  
20 71-2) at pages 9-10 and 12-13 of ECF No. 71; and Ramos Declaration (ECF No. 71-8) at  
21 pages 7, 9-10, 12-13, and 17 of ECF No. 71; and

22 (3) citations to non-record news articles and internet documents at page 10 n.5 of ECF No. 8-  
23 1; pages 4 n.3 and 9 & n.8 of ECF No. 35; page 19 n.4 of ECF No. 71; and page 9 n.11 of  
24 ECF No. 91.

25 IT IS SO ORDERED.

26 Issued this \_\_\_\_ day of \_\_\_\_\_, 201\_\_\_.  
27

28 \_\_\_\_\_  
United States District Judge